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IN THE

Supreme Court of the United States

October Term, 19_____

No. _____

A. L. DUTTON, Warden,
Georgia State Prison,

Petitioner

v.

RUSSELL MOSLEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, Case No. 23310, entered in the above entitled case on October 12, 1966, rehearing of which was denied on November 4, 1966.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit can be found at (R58-66) [1]

[1] (R) as used in this brief will refer to the original record upon which said cause was heard and decided in lower court.

JURISDICTION

The jurisdiction of this court is invoked pursuant to United States Code Annotated Title 28, Part V., Rule 19 (1-b).

The judgment of the United States Court of Appeals was entered October 12, 1966, (R58-66). A rehearing was denied November 4, 1966 (R-73). January 5, 1967, Mr. Justice Black extended the time for filing the petition for writ of certiorari to and including March 31, 1967.

QUESTION PRESENTED

ARE THE SPECIAL CIRCUMSTANCES AS ENUMERATED BY THE LOWER COURT SUFFICIENT TO SHIFT THE BURDEN TO THE RESPONDENT[2] (R-65) TO INTRODUCE COUNTERVAILING EVIDENCE?

STATEMENT OF CASE

Russell Mosley was arrested December 6, 1961, on a warrant charging him with murder (R-59). The Grand Jury for Emanuel County returned an indictment against Respondent in January, 1962, (R-49). He was held in jail from the time of arrest until trial.[3]

On April 9, 1962, Mr. Sidney B. Shepard was appointed to represent Respondent (R-60). The matter

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[2]Respondent as used in this brief will refer to Russell Mosley and Petitioner will refer to A. L. Dutton, Warden.

[3]"Capital offenses are bailable only before a judge of the Superior Court; and this is, in every case, a matter of sound discretion." Georgia Code 27-901: Persons charged with murder are not generally allowed bail.

came on for trial and a verdict of guilty recommending mercy was returned by the trial jury. April 12, 1962, the trial court sentenced Respondent to a life sentence. The Respondent had been out of jail since September 20, 1961, at the time he was incarcerated for the present crime (R-45) which was December 6, 1961.

No appeal was taken from the murder conviction (R-52). Respondent exhausted his state remedies by filing a writ of habeas corpus in the City Court of Reidsville which was subsequently denied March 7, 1964 (R-8). An appeal from that decision of remand was denied (R-8). A petition for writ of habeas corpus was then filed in the United States District Court for the Southern District of Georgia June 29, 1965 (R-1). The cause came on for a hearing September 7, 1965, and the court entered an order remanding on September 21, 1965 (R-1).

Respondent appealed the order to the United States Court of Appeals for the Fifth Circuit. That court remanded the cause for further proceedings (R-66). It is from this judgment that Petitioner sues this his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

"The particular circumstances" as announced by the United States Court of Appeals for the Fifth Circuit are not sufficient in law to shift the burden to Petitioner (R-64). These circumstances are as follows:

A. "Applicant was held incommunicado in several jails for the four months following his arrest."

B. "Then he was furnished counsel; three days later

he was tried, convicted of murder, and sentenced to life imprisonment."

C. "Apparently one of the strongest items of evidence was the 'confession' of a co-defendant, and how that became admissible against the applicant does not appear."

D. "The applicant requested an appeal but no appeal was prosecuted from his judgment of conviction."

PART A

The failure to appoint counsel for an indigent defendant until four (4) months after arrest is not in itself a denial as to that defendant of his right to counsel. Counsel was appointed prior to the trial (R-38). The record in the present case does not reflect that anything transpired during the four (4) month's period that was prejudicial to Respondent.

A critical period is where events transpire that are likely to prejudice the defendant's ensuing trial. See *DeToro v. Peppersack*, 332 F. 2d 341, 343 (4th Cir. 1964); *Wilson v. Harris*, 351 F. 2d 840, 845 (9th Cir. 1965). The four (4) month period of incarceration absent of prejudicial events is not critical.

"The test is whether that proceeding and what occurred thereat may adversely and prejudicially affect his defense to the charge in a subsequent trial." *United States, Ex Rel. Boone v. Fay*, 231 F. Supp. 387, 389 (U.S.D.C. So. Dist. N. Y. 1964); *Wilson v. Harris, supra.* The absence of counsel does not *per se* show a denial of a defendant's constitutional rights. There was no proof of prejudice during this period.

PART B

The appointment of counsel three (3) days before the

trial does not *ipso facto* show ineffective assistance of counsel.

"The only possible point that might have had substance to it was that they were not given sufficient time to prepare for trial, but there is no inflexible rule in this respect. There is no arbitrary time limit involved in these situations. Two hours might be sufficient in one case. It might be wholly inadequate in another. It all depends on the facts and circumstances. These competent counsel investigated the situation by interviewing their clients and having access to the State's evidence . . . So I do not think there is any substance to this point that they were not given sufficient time." *Underwood v. Bomar,* 335 F. 2d 783, 786 N2 (6th Cir. 1964).

Respondent's trial counsel testified as follows:

At (R-48):

"A. Upon my appointment as such, I proceeded with the preliminary investigation in the discussion of the case with law enforcement officers and any other witnesses or persons who knew, either directly or indirectly, of the circumstances surrounding this case."

At (R-49):

"Q. Petitioner has raised the defense concerning appointed counsel that one accused of capital offense cannot have adequate representation and assistance of counsel when appointed counsel affords himself only three (3) days in preparation for Petitioner's defense. What statement do you have to make concerning this allegation?

A. I do not recall exactly how many days prior to actual trial of Russell Mosley that I was appointed

by the Court to represent him. However, as soon as I was appointed, I proceeded with the investigation of the case, talked with all of the witnesses whose names the Defendant, Russell Mosley, had furnished me, together with all of the witnesses for the State. I went to the scene and made an investigation and discussed the case with the Defendant on two or three occasions."

At (R-50):

"Q. Were any witnesses summoned on behalf of the defense? If not, was it your best judgment in handling the case that no witnesses be summoned?

A. Yes, there were witnesses summoned on behalf of the Defendant, namely: Jack Armstrong, Garnette Lindsey, Wilson Morris, H. R. Mosley, Horrace Strange, Peyton Yowmans, Sonny Mills, Bobby Horne, Carl Moore, Carry Morris, Maurice Jackson, B. L. Williamson, and Avis Williamson."

"Q. What were your trial tactics as far as using certain witnesses were concerned?

A. As stated previously, I had talked to each of these witnesses relative to the circumstances and events about which they had knowledge surrounding this offense for which Russell Mosley was accused. After talking with them and after the State had presented its case and put its witnesses on the stand and after conferring with my law partner, Mr. George L. Smith, II,[4] who assisted me in the

[4]*Martindale Hubbell Law Directory* Vol. I (1961 Edition), Lawyers, lists George L. Smith, II, as being born in 1912 and admitted to practice law in 1932, his standard of ability is rated

trial of this case, it was our considered opinion that the use of the witnesses, which we had summoned on behalf of the Defendant, would not be beneficial in the trial of his case."

Respondent has failed to show he was denied effective assistance of counsel (R-36). Respondent's self serving unsupported declaration is insufficient in law to overcome the presumption of the regularity of the trial court proceedings. This is now especially true in light of the testimony of Respondent's trial attorney. To honor Respondent's claim is to censure the trial court and in essence say that the officers of the court perpetrated a fraud upon the Respondent.[5] Whether counsel performed at least as well as a lawyer with ordinary training and skill using his best judgment, and whether the alleged error was prejudicial to a fair trial should be the true test of adequacy of counsel.[6] Success is not the test of effective counsel. See *Hester v. United States* 303 F. 2d 47, 49 (10th Cir. 1962), cert. denied 371 U.S. 847; *Hickock v. Crouse* 334 F. 2d 95 (10th Cir. 1964).

PART C

Respondent produced no evidence to show that the confession of M. F. Mosley was introduced against him at the trial court level. See footnote (R-64). The lower court erred in designating the "alleged introduction of the confession" as a particular circumstance. The burden

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high, recommendations are very high and he attended the University of Georgia.

[5]Hall and Kamisar, *Modern Criminal Procedure,* American Casebook Series (1966 Edition), p. 90.

[6]Waltz, "Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases Notes," 78 *Harv. L. Rev.* 1435 (1965).

was on the Respondent at the District Court level to prove this allegation. There was no proof offered.

There is a presumption which operates in favor of the Respondent (Petitioner here) in a habeas corpus proceeding. *Jones v. Huff,* 152 F. 2d 14 (C.A.D.C. 1945) reiterated that the presumption in favor of regularity of judicial proceedings must be fully included in a habeas corpus proceeding. In addition, 28 U.S.C.A. §§2242-2243 as interpreted in *White v. Pescar,* 155 F. 2d 902 (8th Cir. 1946) would indicate that the government could rest solely on this presumption if it felt that the allegations of the Petitioner (Respondent here) could not be sustained. With this presumption as an obvious base, the courts have held that an uncorroborated statement of the prisoner will not be sufficient to overcome this conclusion. *Cochran v. Kansas* 316 U.S. 255 (1941) reversed on other grounds.

PART D

The record reflects that no appeal was taken by trial counsel because he did not believe there were any grounds on which to base an appeal.

At (R-51):

"Q. Please state any other facts and circumstances which you feel would be pertinent for consideration by the court in a determination of this matter.

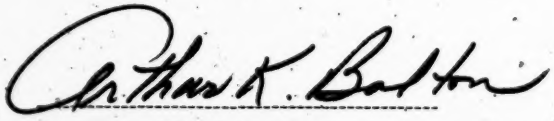
A. In April of 1962, I was appointed by Honorable R. H. Humphrey, Judge, Superior Court of Emanuel County, as Counsel for Russell Mosley, who had been indicted by the Grand Jury of Emanuel County for the offense of murder. De-

fendant was accused of castrating on Wilkes, which resulted in his death. After my appointment, I proceeded with the preliminary investigation of the case, and as Defendant's counsel, and at his request, entered a plea of not guilty. The case went to trial in Emanuel County Superior Court at the April, 1962, term. In a conclusion thereof, the jury returned a verdict of guilty, with a recommendation of mercy. The real and circumstantial evidence introduced at the trial was, in my legal opinion, a preponderance upon which the jury was authorized to reach its verdict. Immediately after the trial, I discussed the case with several members of the Bar, who had heard the evidence, and it was a consensus of opinion that there had been no errors committed in the admission of evidence or in the judge's charge. It is my considered opinion, based on my conversation with the other lawyers, that an appeal or motion for a new trial would have been futile. I was anxious to give Russell Mosley the benefit of all the law and testimony that was in his favor. However, after hearing the evidence presented by the State, and particularly the confession of M. F. Mosley, a co-defendant, it was mine, together with my partner's opinion, that the Defendant's unsworn statement would be of more benefit to him than to use the witnesses which had been summoned in his behalf."

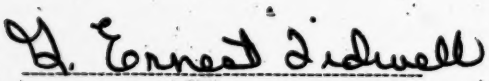
CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

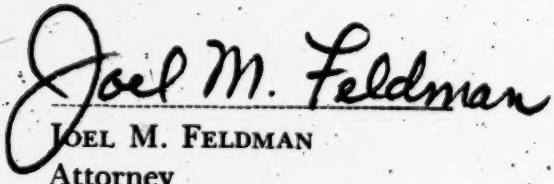
Respectfully submitted,



ARTHUR K. BOLTON
Attorney General



G. ERNEST TIDWELL
Executive Assistant
Attorney General



JOEL M. FELDMAN
Attorney

Attorneys for Petitioner

P. O. Address:

132 Judicial Building
Capitol Square
Atlanta, Georgia 30334

CERTIFICATE OF SERVICE

This is to certify that I have this day, by the United States Mail, properly addressed, postage prepaid, served a copy for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on B. C. Baxter, Jr., 716-20 S. F. Building, Augusta, Georgia, as attorney for Respondent.

This 30 day of March, 1967.

G. Ernest Tidwell

G. ERNEST TIDWELL
Executive Assistant
Attorney General